

# Memorandum

To: XXXXX

From: XXXXX

Subject: Letter Alleging Website Violates Americans with Disabilities Act

Date: January 25, 2016

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## Introduction

Recently, many electric utilities received an unusual letter from two law firms. The law firms allege that an electric utility's website violates the Americans with Disabilities Act of 1990 ("ADA") and similar acts. The law firms threaten litigation and offer a monetary settlement. To assist electric utilities and their attorneys, XXXXX retained outside legal counsel experienced in this area of law and prepared this memorandum. The below discussion addresses this complex and evolving area of law.

Because this area of law is unsettled, it is difficult to predict with certainty whether a court or agency would determine that an electric utility's website violates the ADA or a similar act. Because there are risks, a utility should consult with its attorney when analyzing and addressing the letter. XXXXX hopes the general, but technical, discussion below will help. Depending upon its insurance policy, a utility may need to notify its insurance carrier.

## Summary of Legal Issues

As discussed below, it is unclear whether an electric utility, and specifically the utility's website, are subject to the relevant ADA requirements. If they are subject to the requirements, and if the utility has not met the requirements, then the utility is not subject to monetary damages, unless sued by the United States Department of Justice ("DoJ"). Further, it is unclear whether the law firms represent utility customers with disabilities. If they do not, then they have no right to sue a utility.

## Discussion of Legal Issues

In the letters, the law firms suggest that a website may be inaccessible to individuals with sight disabilities because it is incompatible with screen reader software, does not permit resizing text, or includes insufficient light contrast between foreground and background images. Likewise, the website may be inaccessible to individuals with hearing disabilities because it does not provide closed captioning. Allegedly, this website inaccessibility limits a disabled individual's ability to, among other things, read and consent to the website's privacy and other legal terms and conditions. Instead of suing, the law firms offer to resolve claims by entering a settlement agreement.

ADA. The letters cite and rely extensively on Title III of the ADA. In general, Title III states that a person owning, leasing, or operating a "place of public accommodation" may not discriminate against an individual with a disability regarding the "full and equal enjoyment" of goods and services.<sup>1</sup>

Discrimination includes not providing an "auxiliary aid or service" that could assist the individual, unless providing the aid or service would: (1) fundamentally alter the good or service provided or (2) result in an undue burden, or significant difficulty or expense.<sup>2</sup> An auxiliary aid or service includes "accessible electronic and information technology,"<sup>3</sup> which may include a website.

A public accommodation must provide an auxiliary aid or service that ensures "effective communication" with disabled individuals.<sup>4</sup> An effective communication is provided in an accessible format, a timely manner, and a way that protects an individual's privacy and independence.<sup>5</sup>

Current regulations do not reference "websites" or include technical standards defining an accessible website. In the July 26, 2010 *Federal Register*, however, DoJ published an advance notice of proposed rulemaking.<sup>6</sup> DoJ indicated it was considering promulgating regulations making goods and services offered by public accommodations through the Internet, and specifically through a website, accessible to individuals with disabilities. DoJ hopes to propose the regulations in 2018.

Public Accommodation. Under the ADA, a "public accommodation" is a private entity listed in one of twelve categories. Neither a utility, electric utility, nor similar term is listed in a category. One category, however, includes "other sales or rental establishment." Another category includes "other service establishment."<sup>7</sup> It is unclear whether an electric utility is a public accommodation under ADA Title III.

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<sup>1</sup> 42 U.S.C. § 12182(a) and 28 C.F.R. § 36.201(a).

<sup>2</sup> 42 U.S.C. § 12182(b)(2)(A)(iii) and 28 C.F.R. § 36.303(a).

<sup>3</sup> 28 C.F.R. § 36.303(b)(1).

<sup>4</sup> 28 C.F.R. § 36.303(c)(1).

<sup>5</sup> 28 C.F.R. § 36.303(c)(1)(ii).

<sup>6</sup> <https://www.federalregister.gov/articles/2010/07/26/2010-18334/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-state>.

<sup>7</sup> 42 U.S.C. § 12181(7) and 28 C.F.R. § 36.104.

In nonbinding 1994<sup>8</sup> and 1996<sup>9</sup> letters, DoJ indicated that a utility is not “generally” a public accommodation under ADA Title III. If, however, the utility maintains a customer service office or retail establishment, then these locations would be places of public accommodation under ADA Title III.

Place of Public Accommodation. It is also unclear whether an electric utility’s website is a “place” of public accommodation under ADA Title III. Some federal courts have held that a place of public accommodation must be, or have a connection or link with, a physical place.<sup>10</sup> Other federal courts have held that a place of public accommodation does not need to be, or be connected or linked with, a physical place.<sup>11</sup> DoJ opines that a website may be a place of public accommodation.<sup>12</sup> To prove that an electric utility’s website violates ADA Title III, the law firms must prove that the website is a place of public accommodation.

Monetary Damages. If an electric utility’s website is a place of public accommodation, then a potential or current customer with a disability may sue the utility. If the individual proves that the utility’s website violates ADA Title III, then a court may order the utility to correct the violation. It may also award attorney fees and costs. The court, however, may not award monetary damages.<sup>13</sup>

DoJ must investigate alleged violations of ADA Title III. If DoJ reasonably believes that an electric utility is engaged in a pattern or practice of discrimination, or that a utility has discriminated and the discrimination raises an issue of general public importance, then DoJ may sue the utility. If DoJ proves that the utility’s website violates ADA Title III, then a court may: (1) order the utility to correct the violation; (2) award compensatory, but not punitive, monetary damages to aggrieved persons; and (3) assess a civil penalty to vindicate the public interest, with the penalty not exceeding \$75,000 for the first violation. A determination in a single judgment or settlement that the utility engaged in more than one discriminatory act is a single violation.<sup>14</sup>

Accordingly, if an individual successfully sues an electric utility, then the utility is not subject to monetary damages. If DoJ successfully sues the utility, then the utility may be subject to compensatory damages and a penalty.

Client. Unlike many businesses, only persons located in an electric utility’s service area may purchase electric energy from the utility. It is unclear whether the law firms have clients who are potential or current customers with disabilities. Only these individuals may sue the

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<sup>8</sup> <http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal447.txt>.

<sup>9</sup> <http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/cltr185.txt>.

<sup>10</sup> See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9<sup>th</sup> Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3<sup>rd</sup> Cir. 1998); and Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010-14 (6<sup>th</sup> Cir. 1997).

<sup>11</sup> See Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7<sup>th</sup> Cir. 1999) and Carparts Distribution. Ctr. Inc. v. Automotive Wholesalers Ass’n of New England, Inc., 37 F.3d 12, 19-20 (1<sup>st</sup> Cir. 1994).

<sup>12</sup> See “Statement of Interest of the United States of America” (June 25, 2015) at [http://www.ada.gov/briefs/mit\\_soi.pdf](http://www.ada.gov/briefs/mit_soi.pdf).

<sup>13</sup> 42 U.S.C. § 12188(a)(1) and 28 C.F.R. §§ 36.501(a), 36.505.

<sup>14</sup> 42 U.S.C. § 12188(b) and 28 C.F.R. §§ 36.502, 36.503, 36.504.

utility. Settling protects an electric utility from future lawsuits only if the settlement is with a certified class of individuals with disabilities and a court approves the settlement.

Rehabilitation Act. The letters also reference the Rehabilitation Act of 1973. Under section 504 of the act, a program or activity “receiving federal financial assistance” may not, based solely upon an otherwise qualified individual’s disability: (1) exclude the individual from participation; (2) deny the individual benefits; or (3) subject the individual to discrimination.<sup>15</sup> The letters, however, do not reference section 504. Instead, they reference section 508 and its website standards. Under section 508, federal departments and agencies must have electronic and information technology allowing individuals with disabilities to access information and data in a manner comparable to individuals without disabilities.<sup>16</sup> The typical electric utility is not a federal department or agency.

Voluntary Compliance. Regardless of any legal requirement to comply with ADA Title III and similar acts, an electric utility may, for customer relation, risk mitigation, or other reasons, want to ensure its website is accessible to individuals with disabilities. If so, then version 2.0 of the Web Content Accessibility Guidelines, Levels A and AA, published by the Web Accessibility Initiative of the World Wide Web Consortium, may be helpful.<sup>17</sup> DoJ references these guidelines in its website accessibility agreements.

As a practical matter, providing an alternative, immediate, and easy method of accessing the same goods, services, and information included on your website, whether through a telephone number or otherwise, may limit legal risks under ADA Title III and similar acts.<sup>18</sup> If an electric utility provides non-electric goods or services to the public, then it should consider these goods or services when analyzing and addressing the letter.

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<sup>15</sup> 29 U.S.C. § 794(a).

<sup>16</sup> 29 U.S.C. § 794d.

<sup>17</sup> <https://www.w3.org/WAI/intro/wcag.php>.

<sup>18</sup> See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56316 (Sept. 15, 2010) (“As [DoJ] stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and range of options and programs available.”), available at <https://www.gpo.gov/fdsys/pkg/FR-2010-09-15/pdf/2010-21824.pdf>.